Supreme Court, U.S.
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in the Supreme Court of the United States

October Term, 1994

THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, and EAST COAST INTERMODAL SYSTEMS, INC., a/k/a E.C.I.S., INC.,

Petitioners,

vs.

EMPIRE FIRE & MARINE INSURANCE COMPANY, and LUIS CARBONELL,

Respondents.

On Petition for a Writ of Certiorari to the Florida District Court of Appeals, Third District

PETITION FOR WRIT OF CERTIORARI

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37 pp

QUESTION PRESENTED

WHERE AN OWNER/OPERATOR OF A TRUCK TRACTOR NEGLIGENTLY INJURES A MEMBER OF THE PUBLIC WHILE OPERATING HIS TRUCK FOR A NON-TRUCKING USE, CAN HIS INSURER BE ABSOLVED FROM PRIMARY FINANCIAL RESPONSIBILITY FOR COVERING THE RISK WHICH IT VOLUNTARILY ASSUMED AND FOR WHICH IT COLLECTED PREMIUMS SOLELY BECAUSE ITS INSURED'S TRUCK WAS LEASED TO AN INTERSTATE CARRIER, LICENSED BY THE INTERSTATE COMMERCE COMMISSION?

LIST OF PARTIES

All parties to this petition are listed in the caption. Robert L. LeCount, the Plaintiff in the underlying tort action from which the instant declaratory action arises, was an appellee below. His suit has been resolved, however, and LeCount has been paid. Thus, he is not a party to this petition.

RULE 29.1 LISTING

American International Group, Inc., 70 Pine Street, New York, NY 10270 is the parent company of Co-petitioner The Insurance Company of the State of Pennsylvania. Co-Petitioner East Coast has no parent or subsidiaries. Zurich Insurance Company, Zurich, Switzerland is the parent company of Co-respondent Empire Fire and Marine Insurance Company.

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THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, and EAST COAST INTERMODAL SYSTEMS, INC., a/k/a E.C.I.S., INC.,

Petitioners,

vs.

EMPIRE FIRE & MARINE INSURANCE COMPANY, and LUIS CARBONELL,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE FLORIDA DISTRICT COURT OF APPEALS, THIRD DISTRICT

Petitioners, The Insurance Company of the State of Pennsylvania, and East Coast Intermodal Systems, Inc., a/k/a E.C.I.S., Inc., petition for certiorari review of the judgment and decision of the Florida Third District Court of Appeals in this case, which affirmed in part and reversed in part the decision of the Dade County Circuit Court, Eleventh Judicial Circuit.

OFFICIAL REPORT OF OPINION BELOW

Empire Fire & Marine Ins. Co. v. The Insurance Co. of the State of Penn., and East Coast Intermodal Sys., Inc., a/k/a E.C.I.S., Inc., 638 So.2d 102 (Fla. App. 1994).

JURISDICTION

The Florida Third District Court of Appeal issued its opinion in this case on May 24, 1994. Rehearing was denied in an order dated July 12, 1994. The order herein appealed was rendered by the state court of last resort, pursuant to Article 5, section 3 of the Florida Constitution. This Court's jurisdiction is premised on Title 28, United States Code, section 1257.

STATUTES & REGULATIONS INVOLVED

> 49 C.F.R. § 1057.12 (1987). Written lease requirements. Except as provided in the exemptions set forth in Subpart C of this part, the written lease required under § 1057.11(a) shall contain the following provisions. The required lease provisions shall be adhered to and performed by the authorized carrier.
>
> * * *
>
> (c) Exclusive possession and responsibilities —
>
> (1) The lease shall provide that the authorized carrier lessee shall have exclusive possession, control, and use of the equipment for the duration of the lease. The lease shall further provide that the authorized carrier lessee shall assume complete responsibility for the

operation of the equipment for the duration of the lease.

* * *

(j) Insurance —

(1) The lease shall clearly specify the legal obligation of the authorized carrier to maintain insurance coverage for the protection of the public pursuant to Commission regulations under 49 U.S.C. 10927. The lease shall further specify who is responsible for providing any other insurance coverage for the operation of the leased equipment, such as bobtail insurance. If the authorized carrier will make a charge back to the lessor for any of this insurance, the lease shall specify the amount which will be charged-back to the lessor.

* * *

STATEMENT OF THE CASE

A. Summary

This petition arises from a declaratory action brought by a truck lessor's insurer against the insurer of the truck's Interstate Commerce Commission ["ICC"] licensed lessee. The coverage questions presented arose due to an underlying suit brought by a man who was injured when his vehicle was struck by the ICC carrier-leased vehicle. At the time of the accident, the lessor was driving his truck tractor in a "bobtailing" mode.[1] The Florida appellate court

[1]"Bobtailing" refers to those instances when the truck tractor is not attached to a trailer or under load, when the equipment is being

(Footnote continued on next page)

misapplied ICC regulations in contravention of existing law to wrongly decide that the ICC regulations require the lessee's insurance to be strictly primary as a matter of law and the lessor's coverage to be merely excess.

B. Facts

Petitioner East Coast Intermodal Systems, Inc. ["Lessee"] is a carrier licensed by the ICC. Respondent Luis Carbonell ["Lessor"] is the owner/operator of a truck tractor. Carbonell leased his truck and his driving services to East Coast. Carbonell's and East Coast's lease was permanent in nature and provided that Lessor and his truck would haul only for Lessee. The lease contained an indemnity agreement which stated that Lessor would indemnify Lessee for "all claims, loss, or damage caused by Contractor [Lessor] . . . including, but without limitation, personal injury and property damage . . . ."

The lease provided that Lessee East Coast would be responsible for insuring the truck operations on a primary basis when the truck tractor was under haul, i.e. being used for trucking purposes. The lease further recognized, as required by ICC regulations, that Lessee would provide insurance at all times for the protection of the public and shippers. However, as between the Lessor and the Lessee, the parties agreed that Lessor's insurance would be primary in circumstances where Lessor used his truck for non-trucking purposes, e.g. while the truck tractor was "bobtailing".

(Footnote continued from previous page)
serviced or when it is being used for some other nonrevenue purpose. *See, e.g., Wenkosky v. Protective Ins. Co.*, 698 F.Supp. 1227, 1233 (M.D.Pa. 1988); *Neal v. St. Paul Fire & Marine Ins. Co.*, 250 N.W.2d 648 (Neb. 1977).

Lessee obtained insurance from co-petitioner, The Insurance Company of the State of Pennsylvania, to cover its insurance obligations under the lease. Lessor obtained insurance to cover his insurance obligations under the lease from respondent Empire Fire & Marine Insurance Company ["Empire"].

During the term of the lease, while bobtail driving his rig, Lessor Carbonell collided with a vehicle driven by one Robert LeCount. LeCount filed suit against Carbonell for Lessor's own negligence and as the truck tractor owner. LeCount also sued Lessee East Coast claiming that the Lessor's truck tractor displayed an ICC placard issued to Lessee at the time of the accident.

Lessor's insurer, Empire, attempted to tender its insured's defense to Lessee East Coast and its insurer. Lessee's insurer refused to defend Lessor on the ground that the lease agreement required Lessor to provide his own insurance when he was involved in an accident while bobtailing. Lessor's insurer Empire then brought the instant declaratory action. Empire claimed that because Lessee was an ICC permittee, ICC regulations required, as a matter of law, that Lessee's insurance was primary.

The trial court held that ICC regulations did not render Lessee's insurance *solely* primary as a matter of law, but that pursuant to the applicable ICC regulations, the parties' lease and their respective insurance policies, *both* policies were primary. The lessor's insurer appealed. Lessee and its insurer cross-appealed, claiming that the ICC regulations were not applicable to suits between insurers. Thus, Lessee argued, according to the lease agreement, the applicable insurance contracts and the undisputed fact that Lessor was not under haul when the accident occurred, the lessor's bobtail insurance provided primary coverage to pay the negligence claim.

The Florida appellate court rejected the Lessee's argument and agreed with the Lessor. The Court held that the ICC regulations rendered the Lessee's policy primary, as a matter of law, regardless of the lease's and insurance policies' terms. The Court ruled that, based on what it deemed to be the controlling ICC regulations as applied to the insurance policies, Lessor's bobtail insurance was solely excess over Lessee's insurance policy even though Lessor Carbonell was bobtailing his own truck tractor on his own time when the accident occurred.

REASONS FOR GRANTING THE WRIT

A. Summary

Lessor's insurer successfully contended below that by virtue of the federal "control and responsibility" and financial responsibility regulations covering ICC permittees, the Lessee's insurance was primary as a matter of law and the Lessor's insurance policy was merely excess. The Court ruled in respondent's favor despite the fact that (1) the Lessor's policy was intentionally written to provide *primary* coverage for claims made while the lessor was bobtailing and (2) the lease agreement specifically provided that the Lessor would obtain primary bobtail coverage, thereby enabling him to indemnify the Lessee for any liability it incurred due to the Lessor's negligence while bobtailing.

In ruling as it did, the Florida appellate court wrongly held that ICC regulations, which were solely intended to protect the public, also protect the Lessor's insurer. The Florida Court's erroneous application of federal law in this case requires reversal. Because the holding is but another example of numerous courts' misapplication of the statutory intent underlying the ICC regulations and because of the continued detrimental impact the Courts'

conflict on this issue of federal law has on interstate commerce and the insurance business, this case presents issues worthy of this honorable Court's certiorari review.

B. Intent of the ICC Regulations Was Not to Protect Insurers.

The federal laws at issue are two. First, 49 C.F.R. § 1057.12(c) requires that the authorized carrier maintain "exclusive possession, control, and use of the equipment for the duration of the lease," and "assume complete responsibility for the operation of the equipment for the duration of the lease." The law also requires the ICC-certified carrier to maintain insurance for the protection of the public. *See* 49. U.S.C. § 10927. Second, 49 C.F.R. § 1057.12(j) states that the lease shall specify who is responsible for providing any other insurance coverage for the operation of the leased equipment, such as bobtail insurance. In applying these regulations, the Florida court effectively ruled on the federal issue of the operation and effect of the ICC-mandated endorsement on the ICC carrier's insurance policy. 49 U.S.C. § 10927; ICC Form B.M.C. 90.

An examination of the statutory framework upon which the ICC regulations at issue were founded shows that the regulations were never intended to protect insurers. Their purpose is to ensure that licensed carriers who operate leased motor vehicles are responsible to the public, shippers and the Commission, for the maintenance and safe operation of leased equipment. *E.g., Transamerican Freight Lines, Inc. v. Brada Miller Freight Sys., Inc.*, 423 U.S. 28, 32, 34, 39 (1975). The rules were never intended to nullify the effect of insurance policies that are primary by their own terms. *Empire Fire & Marine Ins. Co. v. Guaranty Nat'l Ins. Co.*, 868 F.2d 357, 363 (10th Cir. 1989). ICC policy does not alter the

application of state insurance law and private agreements between insurers. *Travelers Ins. Co. v. Transport Ins. Co.*, 787 F.2d 1133, 1140 (7th Cir. 1986). *See Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310 (1955).

In fact, one of the major goals of the ICC regulations was to eliminate hard core problems involving holding owner/operators accountable for the safety of their vehicles which they lease to ICC carriers. *See Lease and Interchange of Vehicles by Motor Carriers*, 68 M.C.C. 553, 555 (1956). This Court in *Brada Miller* stated that permitting parties to allocate the responsibility for the lessor's negligence to the lessor could increase operational safety and provide greater protection to the public. 423 U.S. at 41. On the other hand, if the owner/operator is permitted to rely on the lessee's coverage as being primary in bobtailing and other non-trucking situations, the owner/operator's safety incentive is lost.

C. Conflict in the Courts' Application of the Federal Law Exists.

In spite of this established statutory intent, a significant conflict exists in the federal and state courts as to whether ICC rules can be invoked by an insurance company in order to avoid paying out on a risk which it has voluntarily assumed. Citing to *Empire Fire & Marine Ins. Co. v. Guaranty Nat'l Ins. Co.*, 868 F.2d 357 (10th Cir. 1989), the Florida court below recognized this conflict in the legal effect of ICC regulations in suits between insurers when it observed: "Courts throughout the United States are divided in their approach to insurance coverage issues where trucking equipment is leased to an ICC carrier." Lower Court Opinion at 4. In *Empire Fire*, the Tenth Circuit noted the "[c]urrent state of confusion concerning this issue" and stated that "[n]o consensus can be derived from cases in other circuits. . . ." *Id.* at 366.

The conflict exists because certain courts, including the Florida court in this case, erroneously hold that ICC regulations must be read as requiring that the leasee's insurance is always primary, as a matter of law, in suits between insurers. *E.g., East Coast*, 638 So.2d 102 (Fla.App. 1994); *Hagans v. Glen Falls Ins. Co.*, 465 F.2d 1240 (10th Cir. 1972); *Argonaut Ins. Co. v. National Indem. Co.*, 435 F.2d 718 (10th Cir. 1971). Other courts take a middle road. *E.g., Carter v. Vangilder*, 803 F.2d 189 (5th Cir. 1986); *Gaskins v. Jowers*, 775 F.2d 621 (5th Cir. 1985). The majority of courts hold, however, that ICC rules have absolutely no effect on suits between the lessee's and the lessor's insurers in terms of establishing primary financial responsibility for paying out on a claim made. *E.g., Travelers Ins. Co. v. Transport Ins. Co.*, 787 F.2d 1133 (7th Cir. 1986); *Transport Indem. Co. v. Paxton Nat'l Ins. Co.*, 657 F.2d 657 (5th Cir. 1981), *cert. denied*, 455 U.S. 982 (1982); *Carolina Cas. Ins. Co. v. Insurance Co. of N. Amer.*, 595 F.2d 128 (3d Cir. 1979). These cases hold that, in determining the issue of primary and excess liability between insurers in cases involving ICC carriers, the court should look to the terms of the lease agreement and the parties' individual insurance policies and not permit ICC regulations which were instituted for the protection of the public to be asserted by insurers.

The majority position provides the fairest and most practical result and does not subvert the statutory purpose underlying the promulgation of rules regulating interstate carriers. The ICC regulations specifically provide that the parties to the lease may contract to apportion coverage liability risks between themselves where they set out in the lease which party provides insurance under specified circumstances, as for example, bobtailing. 49 CFR § 1057.12(j). It is therefore improper for courts to apply federal law in a manner which disregards Congress' and the parties' intent and finds that the lessee's coverage is

always primary as a matter of law. This is especially true in light of the fact that the statute was never intended to protect insurers.

D. Florida Court's Holding in this Case Effectively Eviscerates This Court's Holding in Brada Miller.

If the Florida court below and other courts continue to be permitted to hold that ICC regulations always cause the lessee's coverage to be primary regardless of the parties' contract and insurance arrangements, and in spite of statutory authority to apportion ultimate financial responsibility between the parties, indemnity agreements become virtually meaningless and this Court's decision in *Brada Miller*, 423 U.S. at 28, is eviscerated. In *Brada Miller*, this Court approved the use of indemnity agreements between the lessee and the lessor and held that such agreements do not violate ICC regulations which provide that any lease of trucking equipment must place control and responsibility for the equipment's operation in the lessee. The Court further held that an indemnity agreement did not conflict with ICC safety regulations.

It is difficult, if not impossible, to reconcile the *Brada Miller* holding with the Florida and other courts' holdings which always make the lessee's insurance policy primary as a matter of law. Indemnity is generally only possible based on the established priority of existing insurance policies. However, in jurisdictions where the lessee's insurance is always primary as a matter of law, the enforcement of an indemnity agreement, permitted under *Brada Miller*, is rendered impossible. Unless the indemnitor has insurance, especially as here where the indemnitor is a one-man truck tractor operator, indemnity is *not possible* unless the indemnitor has insurance which is primary.

By viewing the lower court's application of federal law and the practical impact of that law in the proper perspective, the Florida court's holding negates this Court's ruling in *Brada Miller* approving indemnity agreements in cases such as this. In order for the *Brada Miller* holding to apply uniformly throughout the federal and state court systems, this Court should definitively announce that ICC regulations, promulgated for the protection of the public, have no impact on suits between insurers. In this way, the conflict among the courts would be properly resolved and the holding of *Brada Miller* would have effect in all courts.

E. The Impact of Florida Court's Ruling on Interstate Commerce and the Insurance Industry is of Great Importance and Requires This Court's Immediate Attention.

If lessors' insurers continue to be permitted to hide behind the ICC endorsement and thereby avoid paying that for which they contracted to pay, these insurers will wrongly continue to use federal law to reap an unfair windfall. The lessors' insurers will continue to be able to sell insurance which was written as primary coverage and for which a greater premium was thus paid, yet never have to pay out on a claim, or only have to pay out as excess over the Lessee's policy. Lessors' insurers will thus be able to avoid their contract obligations by simply asserting the protection of ICC regulations which are not even applicable to them.

This Court's immediate attention to this issue is therefore important because until such time as this Court resolves the lower courts' conflict regarding statutory intent, insurers of interstate motor carriers and equipment, drivers, owners, lessors, lessees and ICC permittees will continue to be uncertain as to the effect of

ICC regulations on their contracts and insurance obligations. *See Wilburn Boat Co.*, 348 U.S. at 316, 320-21. Because the issue affects interstate commerce, this Court's timely resolution of the issue is of even greater necessity so that federal law will not be applied differently depending upon the jurisdiction in which an incident raising this question of federal law may occur.

CONCLUSION

In sum, as the situation now stands, the ICC regulations are being used to frustrate the economic stability of the trucking industry, rather than to protect it, as was the regulations' intent. *See, e.g., American Trucking Ass'ns v. United States*, 344 U.S. 298, 304-05 (1953). Because the purpose of the ICC regulations, as with any federal law, is to maintain a satisfactory, uniform condition in the areas in which the federal law operates, certiorari review is warranted due to the current uncertainty in the commercial carrier industry as well as the insurance system, caused by this unresolved issue.

Accordingly, Petitioners respectfully request that this Court grant their petition for certiorari review.

Respectfully submitted,

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Appendix

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
THIRD DISTRICT
JULY TERM, A.D. 1994

JULY 12, 1994

CASE NO. 93-02183, 93-01315
LOWER TRIBUNAL NO. 91-25810

EMPIRE FIRE & MARINE INSURANCE COMPANY,

Appellant(s),

vs.

LUIS CARBONELL, et al.,

Appellee(s).

Upon consideration, appellee The Insurance Company of Pennsylvania's motion for rehearing is hereby denied. Nesbitt, Cope and Gersten, JJ., concur. The Insurance Company of Pennsylvania's motion for rehearing en banc is hereby denied.

A True Copy
ATTEST:
LOUIS J. SPALLONE
Clerk District Court of
Appeal; Third District

By: _____
Chief Deputy Clerk

cc: Rhea P. Grossman
Joseph S. Kashi
William G. Liston
/NB
James I. Knudson
George V. Lanza

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
THIRD DISTRICT

JULY TERM, A.D. 1985

CASE NOS. 93-2183

93-1315

EMPIRE FIRE & MARINE INSURANCE COMPANY,

Appellant/
Cross-appellee,

vs.

THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, AND EAST COAST INTERMODAL SYSTEMS, INC., A/K/A E.C.I.S., INC.,

Appellees/
Cross-appellants,

AND LUIS CARBONELL AND ROBERT L. LECOUNT,

Appellees.

Opinion filed May 24, 1994.

Appeals from the Circuit Court for Dade County, Philip Bloom, Judge.

Rhea P. Grossman, for appellant/cross-appellee.

Marlow, Connell, Valerius, Abrams, Lowe & Adler and James Hughes Villacorta and William G. Liston, for

appellees/cross-appellants; Sperry, Shapiro & Kashi and Joseph S. Kashi (Ft. Lauderdale), for appellee Carbonell.

Before NESBITT, COPE and GERSTEN, JJ.

COPE, Judge.

Empire Fire & Marine Insurance Co. appeals final judgments in a declaratory judgment action to determine the priority of insurance coverage. We affirm in part and reverse in part.

Appellee Luis Carbonell is the owner of a truck-tractor. The owner entered into a lease with appellee East Coast Intermodal Systems, Inc., a carrier operating under an Interstate Commerce Commission permit ("the I.C.C. carrier"). The lease was what is referred to in the industry as a permanent lease. *See Wales Transp., Inc. v. Interstate Commerce Comm'n*, 728 F.2d 774, 777 (5th Cir. 1984); *see generally* 4 Saul Sorkin, *Goods in Transit*, § 45.03 (1994) (discussing early and modern day permanent leases).

Under I.C.C. regulations:

> Exclusive possession and responsibilities — (1) The lease shall provide that the authorized carrier lessee shall have exclusive possession, control, and use of the equipment for the duration of the lease. The lease shall further provide that the authorized carrier lessee shall assume complete responsibility for the operation of the equipment for the duration of the lease.

49 C.F.R § 1057.12(c).

Under the terms of the lease, the owner-lessor not only leased the truck-tractor to the I.C.C. carrier, but also

contracted to provide a driver for the tractor. Under the lease, the owner was also required to handle all repair and maintenance at the owner's expense.

Under the lease and under I.C.C. regulations, the I.C.C. carrier is required "to maintain insurance coverage for the protection of the public pursuant to Commission regulations under 49 U.S.C. [§] 10927. The lease shall further specify who is responsible for providing any other insurance coverage for the operation of the leased equipment, such as bobtail insurance." 49 C.F.R. § 1057.12(j).

The I.C.C. carrier was insured by appellee The Insurance Company of the State of Pennsylvania ("the truckers' policy"). Under the lease, the owner was responsible for providing bobtail coverage. "Bobtail/deadhead insurance is a term generally used to describe 'non-trucking use insurance.' It is intended to cover the insured when the vehicle is not under load, when it is being serviced, or when it is being used for some other non-revenue purpose." 4 Saul Sorkin, *Goods in Transit* § 45.01(1), at 45-4 to 45-5 (footnotes omitted). Appellant Empire Fire & Marine Insurance Co. issued a policy to the owner which provided truckers' insurance for non-trucking use ("the bobtail policy").

In June, 1988, while the lease was in effect, there was an accident between the truck-tractor and another motorist, appellee Robert L. LeCount. The owner was driving the truck-tractor at the time of the accident. The tractor was "bobtailing," that is, traveling without a truck-trailer attached to it. The owner was on the way to obtain an oil change for the truck, after which he was to proceed to pick up a load for the I.C.C. carrier. Pursuant to the lease, the truck-tractor was carrying the I.C.C. carrier's

placard and operating under the I.C.C. permit at the time of the accident.

LeCount filed a lawsuit for damages arising out of the accident. The tort lawsuit has been resolved and LeCount has been paid.

The truckers' insurer (The Insurance Company of the State of Pennsylvania) and the bobtail insurer (Empire Fire & Marine Insurance Co.) both agreed that their insurance policies provided coverage for this accident. However, the insurers could not agree on the priority of coverage. Accordingly, the bobtail insurer brought a declaratory judgment action. The trial court ruled that the two policies would provide pro rata coverage. The trial court also awarded attorney's fees to the owner, against the bobtail insurer, pursuant to section 627.428, Florida Statutes. The bobtail insurer has appealed. The Insurance Company of the State of Pennsylvania and East Coast Intermodal, Inc. cross-appeal the trial court's pro rata coverage determination, arguing that the bobtail coverage should be primary and the truckers' policy should be excess.

Courts throughout the United States are divided in their approach to insurance coverage issues where trucking equipment is leased to an I.C.C. carrier. *See generally* 4 Saul Sorkin, *Goods in Transit*, chap. 45; *Empire Fire & Marine Ins. Co. v. Guaranty Nat'l Ins. Co.*, 868 F.2d 357 (10th Cir. 1989). The difficulty arises from the interplay of the applicable I.C.C. regulations, the terms of the lease agreements, and the terms of the insurance contracts. *See generally Empire Fire & Marine Ins. Co.*, 868 F.2d at 361 (The decisional law has "interpreted the effect of [the] ICC endorsement in at least three ways . . . [each] compel[ling] dramatically different results, yet each [having] jurisprudential support.")

For present purposes we begin by examining the other insurance clauses of the respective insurance contracts. The truckers' policy provides, in part:

> 1. This policy's liability coverage is primary for any covered auto while hired or borrowed by you and used exclusively in your business and pursuant to operating rights granted to you by a public authority . . . .
>
> . . . .
>
> 3. Except as provided in Paragraphs 1 and 2 above, this policy provides primary insurance for any covered auto you own and excess insurance for any covered auto you don't own.
>
> 4. When two or more policies cover on the same basis, either excess or primary, we will pay only our share. Our share is the proportion that the limit of our policy bears to the total of the limits of all the policies covering on the same basis.

In our view, the first-quoted sentence is the one applicable here. The truck-tractor in this case had been hired by the I.C.C. carrier pursuant to the lease agreement. Under the applicable I.C.C. regulations, any such lease agreement must "provide that the authorized carrier lessee shall have exclusive possession, control, and use of the equipment for the duration of the lease. The lease shall further provide that the authorized carrier lessee shall assume complete responsibility for the operation of the equipment for the duration of the lease." 49 C.F.R. § 1057.12(c)(1). The leased vehicle was thus, pursuant to the regulations, leased for the exclusive use of the I.C.C. carrier in its business and pursuant to the

operating rights granted to the I.C.C. carrier by the public authority, namely, the I.C.C.

The I.C.C. carrier argues that the truck-tractor was not being used for the I.C.C. carrier's business because the tractor was on the way to an oil change. Since under the lease the owner was responsible for carrying out the maintenance functions at the owner's expense, the I.C.C. carrier argues that the trip to obtain an oil change takes the matter out for the first sentence of the "other insurance" clause. We disagree.

One of the reasons for the adoption of I.C.C. regulation over the use of leased equipment was to make sure that leased equipment was being properly maintained. *See* 4 Saul Sorkin, *Goods in Transit* § 45.02-.03; *Transamerican Freight lines, Inc. v. Brada Miller Freight Sys., Inc.*, 423 U.S. 28, 36-41, 96 S. Ct. 229, 233-36, 46 L. Ed. 2d 169 (1975); *Empire Fired & Marine Ins. Co.*, 868 F.2d at 360-63. The oil change is a maintenance function which is a part of the trucker's business, just as it would be if the truck-tractor had been owned by the I.C.C. carrier. *See Hartford Ins. Co. v. Occidental Fire & Casualty Co.*, 908 F.2d 235 (7th Cir. 1990) (Driver of tractor was using truck "in the business of" carrier lessee where injury occurred while driver was en route to pick up trailer which had been repaired); *St. Paul Fire & Marine Ins. Co. v. Frankart*, 370 N.E.2d 1058 (Ill. 1977)(tractor trailer used in business of common carrier at time of accident where driver was returning home from delivering cargo and made short diversion to obtain fuel at a cheaper price). Moreover, maintenance is necessary for the tractor's continued operation in the I.C.C. carrier's business. Accordingly we agree with the trial court that the truckers' policy provides primary coverage in this case.

We part company with the trial court, however, on its conclusion that the bobtail policy also provides primary coverage. The bobtail policy provides, in part:

> 1. This policy's liability coverage is primary for any covered **auto** while hired or borrowed by you and used exclusively in **your** business and over a route or territory, if any, **you** are authorized to serve by public authority. This policy's liability coverage is excess over any other collectible insurance for any covered **auto** while hired or borrowed from you by another trucker. . .
>
> 2. Except at proved in Paragraph 1 above, this policy provides primary insurance for any covered **auto you** own and excess insurance for any covered **auto** you don't own.
>
> 3. When two or more policies cover on the same basis, either excess or primary, **we** will pay only **our** share. **Our** share is the proportion that the limit of **our** policy bears to the total of the limits of all the policies covering on the same basis.

The first quoted sentence does not apply to the owner in this case, but the second sentence does. The truck-tractor in this case had been hired from the owned by the I.C.C. carrier. The I.C.C. carrier's policy provides primary coverage. Under the terms of the bobtail policy, the bobtail policy's coverage is excess.

The trial court had concluded that both policies provided primary coverage and that the two policies would be required to prorate. We agree with the trial court that the truckers' policy is primary, but conclude that the bobtail policy provides excess coverage in this case. We

therefore reverse the declaratory judgment in part and remand with directions to enter judgment in accordance with this opinion.

As to the award of attorney's fees to the owner, the appellant concedes that the award is correct. The attorney's fee order in favor of appellee Carbonell is therefore affirmed in its entirety.

Affirmed in part, reversed in part, and remanded for proceedings consistent herewith.

IN THE CIRCUIT COURT
OF THE 11TH JUDICIAL CIRCUIT
IN AND FOR DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO. 91-25810 CA 25

EMPIRE FIRE AND MARINE INSURANCE COMPANY,

Plaintiff,

vs.

LUIS CARBONELL, EAST COAST INTERMODAL SYSTEMS, INC. a/k/a E.C.I.S., INC., THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA and ROBERT L. LECOUNT,

Defendants.

FINAL SUMMARY JUDGMENT

THIS CAUSE having come before the Court on May 7, 1993 on Defendants' THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, and EAST COAST INTERMODAL SYSTEMS, INC., Motion for Final Summary Judgment, it is hereby

ORDERED AND ADJUDGED:

1. Defendant's Motion for Rehearing is GRANTED.

2. Paragraph four (4) of the Partial Summary Judgment entered on February 17, 1993, is hereby

RESCINDED and VACATED, to be replaced by the following:

> 4. Liability insurance coverage will be provided by both EMPIRE FIRE AND MARINE INSURANCE COMPANY under policy number BA 97 61 48 and by THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA under policy number TA 191 21 40 on a pro rata basis for the vehicular accident described in the companion case, *Lecount v. Carbonell and EAST COAST INTERMODAL SYSTEMS, INC.*, Case No.: 90-58738 CA (23) in the Circuit Court of the 11th Judicial Circuit, in and for Dade County, Florida.

3. All portions of the Partial Summary Judgment entered on February 17, 1993 not concerning the priority of insurance coverage between EMPIRE FIRE AND MARINE INSURANCE COMPANY and THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA remain in full force and effect.

DEFENDANTS SHALL GO HENCE FORTH WITHOUT DAY.

ORDERED AND ADJUDGED in Chambers at Miami, Dade County, Florida this 12 day of May, 1993.

/s/ PHILIP BLOOM
CIRCUIT JUDGE

IN THE CIRCUIT COURT
OF THE 11TH JUDICIAL CIRCUIT
IN AND FOR DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO. 91-25810 CA 25

EMPIRE FIRE AND MARINE INSURANCE COMPANY,

Plaintiff,

vs.

LUIS CARBONELL, EAST COAST INTERMODAL SYSTEMS, INC. a/k/a E.C.I.S., INC., THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA and ROBERT L. LECOUNT,

Defendants.

SECOND PARTIAL SUMMARY JUDGMENT

On January 22, 1993, the court entered a Partial Summary Judgment on the motion of defendant, ROBERT LeCOUNT. The Partial Summary Judgment determined all of the issues in this action with the exception of the priority of liability insurance coverage between plaintiff, EMPIRE FIRE AND MARINE INSURANCE COMPANY, and defendant, THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA.

On February 8, 1993, the court held a hearing on plaintiff's Motion for Summary Judgment. Based upon the motion, the argument of counsel for the respective parties, and the record in this cause, the court is convinced that the rulings contained in its Partial Summary Judgment of

January 22, 1993 are correct, and the court reaffirms those rulings. In addition, the court determines that the coverage afforded by defendant, THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, is primary, and the insurance coverage afforded by plaintiff, EMPIRE FIRE AND MARINE INSURANCE COMPANY, is excess. Accordingly, it is

ORDERED AND ADJUDGED, AND DECLARED that:

1. Defendant INTERMODAL as the lessee/ interstate carrier had exclusive possession, control and use of the leased vehicle and assumed complete responsibility for the operation, maintenance and use of defendant CARBONELL's vehicle during the lease term as though defendant INTERMODAL were the owner pursuant to federal law and ICC regulations, including 49 U.S.C. 11107 and 10321 and 49 CFR 1057.12, and, therefore, defendant INTERMODAL is liable for any negligence of defendant CARBONELL during the lease term causing injury and damages to the public, including those which may be recoverable by defendant LeCOUNT and his spouse in the companion case, *LeCount v. Carbonell*, Case No. 90-58738-CA-23, in the Circuit Court of the 11th Judicial Circuit, in and for Dade County, Florida, due to any such negligence of defendant CARBONELL causing, in whole or in part, the subject accident. *See Simmons v. King*, 478 F.2d 857, 867 (5th Cir. 1978); *Judy v. Tri-State Motor Transit Co.*, 844 F.2d 1496, 1500 (11th Cir. 1988); *Rodriguez v. Ager*, 705 F.2d 1229, 1236 (10th Cir. 1983); *Baker v. Roberts Express, Inc.*, 1992 WL 19543 (S.D. Ohio 1992); and *Empire Fire and Marine Insurance v. Truck Insurance Exchange*, 462 So.2d 76, 78 (1st DCA 1985).

2. Defendant EMPIRE affords liability coverage up to its policy limits of THREE HUNDRED THOUSAND

DOLLARS ($300,000.00) to defendant CARBONELL with respect to the subject accident under its policy number BA 97 61 48, and any language in the policy attempting to exclude coverage is contradictory to the language of the policy extending coverage under the facts of the subject accident, and therefore, unenforceable. *See Transport Indemnity Co. v. Carolina Casualty Insurance Co.*, 652 F.2d 134, 138 (Ariz. 1982).

3. Defendant PENNSYLVANIA affords liability coverage up to its policy limits of ONE MILLION DOLLARS ($1,000,000.00) to defendant INTERMODAL and defendant CARBONELL with respect to the subject accident under its policy number TA 191 21 40 RA, and any language therein attempting to limit coverage to defendants INTERMODAL or CARBONELL under the facts of the subject accident is contrary to federal law, including 49 U.S.C. 10927 and 49 CFR 1043.1 and the ICC endorsement attached to and forming a part of said policy, and therefore is negated by federal law and the ICC endorsement and unenforceable. *See Empire Fire and Marine Insurance v. Guaranty Nat. Ins.*, 868 F.2d 357, 363 (10th Cir. 1989).

4. The coverage afforded by defendant, THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, is primary, and the coverage afforded by plaintiff, EMPIRE FIRE AND MARINE INSURANCE COMPANY, is excess.

5. The court reserves jurisdiction to award attorneys' fees and costs.

ORDERED AND ADJUDGED in Chambers at Miami, Dade County, Florida this 17 day of February, 1993.

/s/ PHILIP BLOOM
CIRCUIT JUDGE

IN THE CIRCUIT COURT
OF THE 11TH JUDICIAL CIRCUIT
IN AND FOR DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO. 91-25810 CA 25

EMPIRE FIRE AND MARINE INSURANCE COMPANY,

Plaintiff,

vs.

LUIS CARBONELL, EAST COAST INTERMODAL SYSTEMS, INC. a/k/a E.C.I.S., INC., THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA and ROBERT L. LECOUNT,

Defendants.

PARTIAL SUMMARY JUDGMENT

Defendant ROBERT L. LECOUNT's Motion for Summary Judgment, or Alternatively, Partial Summary Judgment, in this declaratory decree action having come on for hearing on the 15th day of January, 1993, with all parties being represented by counsel as noted hereinbelow, and the Court having reviewed the court file, heard argument of counsel, and being otherwise duly advised in the premises, and the Court finding therefrom that there exists no material issue of fact with respect to the fact: (1) that Defendants CARBONELL and LECOUNT were involved in a vehicle collision in Dade County, Florida, on June 27, 1988; (2) that at the time of the collision Defendant CARBONELL was driving a truck (semi rig without a trailer — i.e., Bobtailing) which truck was owned

by CARBONELL and leased, with CARBONELL as driver, to Defendant INTERMODAL pursuant to the lease agreement, commonly known in the interstate trucking industry as a "permanent lease agreement", as produced pursuant to discovery in this action and attached to Defendant LECOUNT's subject motion; (3) that Defendant EMPIRE insured Defendant CARBONELL as the named insured under the insurance policy attached as Exhibit 1 to Plaintiff's complaint in this declaratory decree action on the date of the subject accident; and (4) that Defendant PENNSYLVANIA insured Defendant INTERMODAL as the named insured under the insurance policy attached as Exhibit 2 to the Plaintiff's complaint in this action on the date of the subject accident; and therefore, based upon the foregoing facts and the applicable law, including the United States Code provisions and Interstate Commerce Commission regulations governing permanent lease agreements and the relationship of the parties under said lease agreements, as well as the liability insurance coverage requirements for interstate carriers such as Defendant Intermodal, partial summary judgment is proper and should be granted as a matter of law in this declaratory decree action with respect to the liability of Defendant Intermodal for any negligence of Defendant Carbonell in the operation, maintenance or use of the leased vehicle during the term of the lease which may be determined to have caused injury and damages to Defendant LeCount and his spouse in the companion case referenced hereinafter and regarding the coverage afforded under the referenced policies with respect to the subject accident; and,

NOW THEREFORE, it is,

ADJUDGED that:

1. Defendant INTERMODAL as the lessee/interstate carrier had exclusive possession, control and use of the leased vehicle and assumed complete responsibility for the operation, maintenance and use of Defendant CARBONELL's vehicle during the lease term as though Defendant INTERMODAL were the owner pursuant to federal law and ICC regulations, including 49 U.S.C. 11107 and 10321 and 49 CFR 1057.12, and therefore, Defendant INTERMODAL is liable for any negligence of Defendant CARBONELL during the lease term causing injury and damages to the public, including those which may be recoverable by Defendant LECOUNT and his spouse in the companion case, *LECOUNT V. CARBONELL*, CASE NO. 90-58738-CA-23, In The Circuit Court Of The Eleventh Judicial Circuit In And For Dade County, Florida, due to any such negligence of Defendant Carbonell causing, in whole or in part, the subject accident. See *Simmons v. King*, 478 F.2d 857, 867 (5th Cir. 1978); *Judy v. Tri-State Motor Transit Co.*, 844 F.2d 1496, 1500 (11th Cir. 1988; *Rodriguez v. Ager*, 705 F.2d 1229, 1236 (10th Cir. 1983); *Baker v. Roberts Express, Inc.*, 1992 W.L. 19543 (S.D. Ohio 1992); and *Empire Fire and Marine Insurance v. Truck Insurance Exchange*, 462 So.2d 76, 78 (1st DCA Fla. 1985).

2. Defendant EMPIRE affords liability coverage up to its policy limits of THREE HUNDRED THOUSAND DOLLARS ($300,000.00) to Defendant CARBONELL with respect to the subject accident under its policy number BA 97 61 48, and any language in the policy attempting to exclude coverage is contradictory to the language of the policy extending coverage under the facts of the subject accident, and therefore, unenforceable. See *Transport Indemnity Co. v. Carolina Casualty Insurance Company*, 652 P.2d 134, 138 (Ariz. 1982).

3. Defendant PENNSYLVANIA affords liability coverage up to its policy limits of ONE MILLION

DOLLARS ($1,000,000.00) to Defendant INTERMODAL and Defendant CARBONELL with respect to the subject accident under its policy number TA 191 21 40 RA, and any language therein attempting to limit coverage to Defendants INTERMODAL or CARBONELL under the facts of the subject accident is contrary to federal law, including 49 U.S.C. 10927 and 49 CFR 1043.1 and the ICC endorsement attached to an forming a part of said policy, and therefore is negated by federal law and the ICC endorsement and unenforceable. See *Empire Fire and Marine Ins. v. Guaranty Nat. Ins.*, 868 F.2d 357, 363 (10th Cir. 1989).

4. This Court reserves and defers ruling pending further proceedings in this action on the remaining issue of priority of liability insurance coverage between Plaintiff EMPIRE and Defendant PENNSYLVANIA under their respective policies, and the Court does hereby confirm that said issue of whether one of said carriers is primary and the other excess, or both are co-primary, with respect to the subject accident is the sole remaining issue to be adjudicated in this action.

DONE AND ORDERED in Chambers at Miami, Dade County, Florida this 22 day of January, 1993.

/s/ PHILIP BLOOM
CIRCUIT JUDGE

Supreme Court, U.S.
FILED
NOV 14 1994
OFFICE OF THE CLERK

No. 94-655

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1994

THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, and EAST COAST INTERMODAL SYSTEMS, INC., a/k/a E.C.I.S., INC.,

Petitioners,

v.

EMPIRE FIRE & MARINE INSURANCE COMPANY, and LUIS CARBONELL,

Respondents.

On Petition for a Writ of Certiorari to the Florida District Court of Appeals, Third District

RESPONDENT'S BRIEF IN OPPOSITION

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HOPP

QUESTIONS PRESENTED

1. Whether there is jurisdiction pursuant to *28 U.S.C. §1257*; and if so,

2. Whether the determination of priorities of insurance coverage was based on an illegal application of ICC Regulations and/or federal law?

RULE 29.1 LISTING

The Respondent, **EMPIRE FIRE & MARINE INSURANCE COMPANY**, amends the Rule 29.1 Listing in Petitioners' Brief and states:

Zurich Insurance Co. of Zurich Switzerland owns 100% of Zurich Holding Co. of America which owns 100% of american Guarantee & Liability Ins. Co., a New York corporation, which owns 100% of **EMPIRE FIRE & MARINE INSURANCE COMPANY.**

EMPIRE FIRE & MARINE INSURANCE COMPANY owns 100% of Empire Indemnity Ins. Co., an Oklahoma corporation; 100% of Douglas Street Premium Finance Co. of California; 100% of Douglas Street Premium Finance Co., a Nebraska corporation; 51% of Truckwriters, Inc, a Nebraska corporation; and 51% of Williams & Strazzone Ins. Agency, a Nebraska corporation.

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No. 94-655

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1994

THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, and EAST COAST INTERMODAL SYSTEMS, INC., a/k/a E.C.I.S., INC.,

Petitioners,

v.

EMPIRE FIRE & MARINE INSURANCE COMPANY, and LUIS CARBONELL,

Respondents.

On Petition for a Writ of Certiorari to the Florida District Court of Appeals Third District

RESPONDENT'S BRIEF IN OPPOSITION

OPINION BELOW

This appeal is from the decision of the Third District Court of Appeals for the State

of Florida in *Empire Fire & Marine Ins. Co. v. The Insurance Co. of the State of Penn., and East Coast Intermodal Sys., Inc., a/k/a E.C.I.S., Inc.*, 638 So.2d 102 (Fla. 3rd DCA 1994) (App.1-13) and the order of the appellate court denying Petitioners' Motion for Rehearing and Rehearing En Banc (App.14-15).

JURISDICTION

The Order of the Appellate Court denying Petitioners' Motion for Rehearing is dated July 12, 1994. (App.14-15). The Petition for Writ of Certiorari was filed on October 8, 1994. The jurisdiction of this Court is erroneously evoked pursuant to *28 U.S.C. §1257*.

STATEMENT

The Respondent objects to the Petitioners' Statement of the Case in the following instances:

1. The Third District Court of Appeal

determined that the pursuant to ICC regulations **and** the provisions of the actual insurance policies, Petitioner, under Florida law, owed primary coverage to the insured vehicle. The appellate court of Florida did not use the mandatory provisions of the ICC regulations solely in determining priorities between insurance coverages and did not "eviscerate" the holding in *Brada Miller*. The Florida court determined that the language of the Petitioners' policy was in conformity with the required I.C.C. regulations and required full coverage in the absence of "other insurance". There was no "other insurance". There was excess insurance. Respondent was not a party to the Petitioners' policy nor a party to the agreement between the lessee and lessor requiring bobtail coverage. The separate bobtail insurance provided by Respondent's policy only provided excess coverage by its terms.

2. The Florida Third District Court of Appeal was not the court of last resort.

ARGUMENT

I.

THERE IS NO JURISDICTION PURSUANT TO 28 U.S.C. §1257.

A review on writ of certiorari is not a matter of right, but of judicial discretion. *28 U.S.C. §1257* provides for certiorari so that

> Final judgments or decrees rendered by the highest court of a State in which a decision *could be had*, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States. [emphasis added]

In the instant matter, the Florida

Supreme Court, the highest court in Florida, was never given an opportunity to determine the issue. The Petitioners' merely filed a Motion for Rehearing and Rehearing En Banc (App.16-22) and did not request Supreme Court Certification and provided by the Florida Constitution and *Rule 9.330 (a) and (b), Florida Rules of Appellate Procedure*. (App.23)

Pursuant to *Article V, Section 3(b)(3) and (4), The Florida Constitution*, the Supreme Court possesses **discretionary** jurisdiction to review decisions of district courts of appeal:

a. that expressly affect a class of constitutional or state officers;

b. that expressly and directly conflict with a decision of another district court of appeal or the supreme court;

c. that expressly construe a provision of the state or federal constitution;

d. that expressly declare valid a state statute; or

e. that the district court certifies to be of great public importance or in direct conflict with a decision of another district court of appeal.

Thus, a review of the Third District Court of Appeal decision in this cause ***could have been had*** *by the Florida Supreme Court* had the Petitioners properly sought certification of a question of "great importance" as alleged in the Petitioners' Brief. The Florida Supreme Court has never been given the opportunity to exercise its discretionary jurisdiction so the opinion as mandated by the Third District Court of Appeal is not final nor was the opinion rendered by the court of last resort as alleged by the Petitioners.

II.

THE FLORIDA COURT'S DETERMINATION OF PRIORITIES OF COVERAGE BETWEEN INSURANCE CARRIERS INVOLVED IN INTERSTATE COMMERCE DOES NOT VIOLATE FEDERAL LAW NOR IMPACT ADVERSELY ON INTERSTATE COMMERCE AND ICC REGULATIONS.

Petitioners' argument is centered around their interpretation of the Third District Court's mandate. According to Petitioners, "the Florida appellate court wrongly held that ICC regulations, which were solely intended to protect the public, also protect the Lessor's insurer." (Initial Brief, page 6).

The appellate decision, after considering the various federal cases, considered the "interplay of the applicable I.C.C. regulations, the terms of the insurance contracts", and then reviewed the actual language of the two policies. (App.1-13)

The court determined that:

> The truck-tractor in this case had been hired from the owne[r] by the I.C.C. carrier. The I.C.C. carrier's policy provides

> primary coverage. *Under the terms of the bobtail policy, the bobtail policy's coverage is excess.* [emphasis added] (App.12)

The Respondent concurs that state law and private agreements between carries are not affected by the ICC regulations. *Travelers Ins. Co. v. Transport Ins. Co.*, 787 F.2d 1133 (7th Cir. 1986). In this case, there was no agreement between the insurance carriers. The lessee of the tractor-trailer purchased one policy (Petitioners' policy) and the lessor purchased a second policy (Respondent's policy).

The fact that the bobtail policy purchased by the lessor did not conform to the intent of the lease agreement entered into between the lessee and lessor is of no matter to the Respondent.

The decision of the Florida appellate court did not change nor conflict with the decision in *Transamerican Freight Lines, Inc. v. Brada Miller Freight Sys., Inc.*, 423 U.S. 28 (1975).

The Petitioners' misconstrue the appellate court's determination that the primary coverage was determined by the appellate court because the ICC regulations required that the lessee be primarily responsible for the control and maintenance of the vehicle. The appellate court first determined that since there was no definitive definition of "bobtailing" in the Petitioners' insurance policy nor in the lease agreement, the fact that the lessor was responsible for the maintenance of the truck, did not indicate that the taking of the truck for an oil change was "bobtailing". The appellate court used the common understanding and definition of bobtailing and determined that the truck was not being used in such a situation. Under this reasoning, the court determined that primary responsibility for the accident was with the Petitioner. (App.8-10)

In *Brada Miller* this court determined that

indemnity agreements between lessees and lessors did not conflict with ICC regulations. Nothing in the appellate decision under review contradicts this statement. In fact, Florida law does recognize the right to shift the burden of insurance coverage between ICC insurance carriers. *Canal Ins. Company v. Hartford Insurance Company*, 415 So.2d 1295 (Fla. 1st DCA 1982); *State Automobile Mutual Insurance Co., v. Ryder Truck Rental, Inc.*, 627 So.2d 1326 (Fla. 3rd DCA 1993).

Regardless of the court's interpretation of bobtailing, the appellate court found, as was the situation in the *Canal* case, that Respondent's policy specifically did not extend primary coverage to the lessee in this case. (App.11-12)

Since the Respondent was not a party to the lease agreement between the lessee and lessor, and since the Respondent's policy specifically excluded primary coverage for this accident, the appellate decision is in

accord with Florida insurance law and does not in any instant violate federal ICC regulations or federal law.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

RHEA P. GROSSMAN
RHEA P. GROSSMAN, P.A.
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IN THE DISTRICT COURT
OF APPEAL OF FLORIDA

THIRD DISTRICT

JANUARY TERM, A.D.
1994

EMPIRE FIRE AND MARINE INSURANCE COMPANY,

Appellant/
Cross-appellee,

vs.

THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, AND EAST COAST INTERMODAL SYSTEMS, INC., a/k/a/ E.C.I.S., INC.

Appellees/
Cross-appellants,

and LUIS CARBONELL and ROBERT L. LeCOUNT,

Appellees.

CASE NOS. 93-2183, 93-1315

Opinion filed May 24, 1994.

Appeals from the Circuit Court for Dade County, Philip Bloom, Judge.

Rhea P. Grossman, for appellant/cross-appellee.

Marlow, Connell, Valerius, Abrams, Lowe & Adler and James Hughes Villacorta and William G. Liston, for appellees/cross-appellants; Sperry, Shapiro & Kashi and Joseph S. Kashi (Ft. Lauderdale), for appellee Carbonell.

Before NESBITT, COPE and GERSTEN, JJ.

COPE, Judge.

Empire Fire & Marine Insurance Co. appeals final judgments in a declaratory judgment action to determine the priority of insurance coverage. We affirm in part and reverse in part.

Appellee Luis Carbonell is the owner of a truck-tractor. The owner entered into a lease with appellee East Coast Intermodal Systems, Inc., a carrier operating under an Interstate Commerce permit ("the I.C.C. carrier"). The lease was what is referred to in the industry as a permanent lease. See Whales Trnsp., Inc. v. Interstate Commerce Comm'n, 728 F.2d 774, 777 (5th Cir. 1984); see generally 4 Saul Sorkin, Goods in Transit, §45.03 (1994) (discussing early and modern day permanent

leases).

Under I.C.C. regulations:

> Exclusive possession and responsibilities--(1) The lease shall provide that the authorized carrier lessee shall have exclusive possession, control, and use of the equipment for the duration of the lease. The lease shall further provide that the authorized carrier lessee shall assume complete responsibility for the operation of the equipment for the duration of the lease.

49 C.F.R. § 1057.12(c).

Under the terms of the lease, the owner-lessor not only leased the truck-tractor to the I.C.C. carrier, but also contracted to provide a driver for the tractor. Under the lease, the owner was also required to handle all repair and maintenance at the owner's expense.

Under the lease and under I.C.C. regulations, the I.C.C. carrier is required "to maintain insurance coverage for the protection of the pubic pursuant to Commission regulations under 49 U.S.C. [§] 10927. The

lease shall further specify who is responsible for providing any other insurance coverage for the operation of the leased equipment, such as bobtail insurance." 49 C.F.R. § 1057.12(j).

The I.C.C. carrier was insured by appellee The Insurance Company of the State of Pennsylvania ("the truckers' policy"). Under the lease, the owner was responsible for providing bobtail coverage. "Bob-tail/deadhead insurance is a term generally used to describe 'non-trucking use insurance." It is intended to cover the insured when the vehicle is not under load, when it is being serviced, or when it is being used for some other non-revenue purpose." 4 Saul Sorkin, Goods in Transit § 45.01(1), at 45-4 to 45-5 (footnotes omitted). Appellant Empire Fire & Marine Insurance Co. issued a policy to the owner which provided truckers' insurance for non-trucking use ("the bobtail policy").

In June, 1988, while the lease was i

effect, there was an accident between the truck-tractor and another motorist, appellee Robert L. LeCount. the owner was driving the truck-tractor at the time of the accident. The tractor was "bobtailing," that is, traveling without a truck-trailer attached to it. The owner was on the way to obtain an oil change for the truck, after which he was to proceed to pick up a load for the I.C.C. carrier. Pursuant to the lease, the truck-tractor was carrying the I.C.C. carrier's placard and operating under the I.C.C. permit at the time of the accident.

LeCount filed a lawsuit for damages arising out of the accident. The tort lawsuit has been resolved and LeCount has been paid.

The truckers' insurer (The Insurance Company of the State of Pennsylvania) and the bobtail insurer (Empire Fire & Marine Insurance Co.) both agreed that their insurance policies provided coverage for the

accident. However, the insurers could not agree on the priority of coverage. Accordingly, the bobtail insurer brought a declaratory judgment action. The trial court ruled that the two policies would provide pro rata coverage. The trial court also awarded attorney's fees to the owner, against the bobtail insurer, pursuant to section 627.428, Florida Statutes. The bobtail insurer has appealed. The Insurance Company of the State of Pennsylvania and East Coast Intermodal, Inc. cross-appeal the trial court's pro rata coverage determination, arguing that the bobtail coverage should be primary and the truckers' policy should be excess.

Courts through the United States are divided in their approach to insurance coverage issues where trucking equipment is leased to an I.C.C. carrier. See generally 4 Saul Sorkin, Goods in Transit, chap. 45; Empire Fire & Marine Ins. Co. v. Guaranty

Nat'l Ins. Co., 868 F.2d 357 (10th Cir. 1989). The difficulty arises from the interplay of the applicable I.C.C. regulations, the terms of the lease agreements, and the terms of the insurance contracts. See generally Empire Fire & Marine Ins. Co., 868 F.2d at 361 (The decisional law haws "interpreted the effect of [the] ICC endorsement in at least three ways . . . [each] compel[ing] dramatically different results, yet each [having] jurisprudential support.")

For present purposes we begin by examining the other insurance clauses of the respective insurance contracts. 'the truckers' policy provides, in part:

> 1. This policy's liability coverage is primary for any covered **auto** which hired or borrowed by **you** and used exclusively in **your** business and pursuant to operating rights granted to you by a public authority. . . .
>
> . . .
>
> 3. Except as provided in Paragraphs 1 and 2 above this policy

> provides primary insurance for any covered **auto you** own and excess insurance for any covered **auto you** don't own.
>
> 4. When two or more policies cover on the same basis, either excess or primary, **we** will pay only **our** share. **Our** share is the proportion that the limit of **our** policy bears to the total of the limits of all the policies covering on the same basis.

In our view, the first-quoted sentence is the one applicable here. The truck-tractor in this case had been hired by the I.C.C. carrier pursuant to the lease agreement. Under the applicable I.C.C. regulations, any such lease agreement must "provide that the authorized carrier lessee shall have exclusive possession, control, and use of the equipment for the duration of the lease. The lease shall further provide that the authorized carrier lessee shall assume complete responsibility for the operation of the equipment for the duration of the lease." 49 C.F.R. § 1057.12(c)(1). The leased vehicle

was thus, pursuant to the regulations, leased for the exclusive use of the I.C.C. carrier in its business and pursuant to the operating rights granted to the I.C.C. carrier by the public authority, namely, the I.C.C.

The I.C.C. carrier argues that the truck-tractor was not being used for the I.C.C. carrier's business because the tractor was on the way to an oil change. Since under the lease the owner was responsible for carrying out the maintenance functions at the owner's expense, the I.C.C. carrier argues that the trip to obtain an oil change takes the matter out of the first sentence of the "other insurance" clause. We disagree.

One of the reasons for the adoption of I.C.C. regulation over the use of leased equipment was to make sure that leased equipment was being properly maintained. See 4 Saul Sorkin, Goods in Transit § 45.02-.03; Transamerican Freight Lines, Inc. v. Brada

Miller Freight Sys., Inc., 423 U.S. 28, 36-41, 96 S.Ct. 229, 233-36, 46 L.Ed. 2d 169 (175); Empire Fire & Marine Ins. Co., 868 F.2d at 360-63. The oil change is a maintenance function which is a part of the trucker's business, just as it would be if the truck-tractor had been owned by the I.C.C. carrier. See Hartford Ins. Co. v. Occidental 'fire & Casualty Co., 908 F.2d 235 (7th Cir. 1990) (Driver of tractor was using truck "in the business of" carrier lessee where injury occurred while driver was e route to pick up trailer which had been repaired); St. Paul Fire & Marine Ins. Co. v. Frankart, 370 N.E. 2d 1058 (Ill. 1977) (tractor trailer used in business of common carrier at time of accident where driver was returning home from delivering cargo and made short diversion to obtain fuel at a cheaper price). Moreover, maintenance is necessary for the tractor's continued operation in the I.C.C. carrier';s

business. Accordingly we agree with the trial court that the truckers' policy provides primary coverage in this case.

We part company with the trial court, however, on its conclusion that the bobtail policy also provides primary coverage. The bobtail policy provides, in part:

> 1. This policy's liability coverage is primary for any covered auto while hired or borrowed by you and used exclusively in **your** business and over a route or territory, if any, **you** are authorized to serve by public authority. This policy's liability coverage is **excess** over any other collectible insurance for any covered **auto** while hired or borrowed from **you** by another trucker. ...
>
> 2. Except as provided in Paragraph 1 above, this policy provides primary insurance for any covered **auto you** own and **excess insurance for any covered** auto **you** don't own.
>
> 3. When two or more policies cover on the same basis, either excess or primary, **we** will pay only **our share**. **Our share** is the proportion that the limit of **our** policy **bears** to the total of the limits of all the policies covering on the same basis.

The first quoted sentence does not apply to the owner in this case, but the second sentence does. The truck-tractor in this case had been hired from the owner by the I.C.C. carrier. The I.C.C. carrier's policy provides primary coverage. Under the terms of the bobtail policy, the bobtail policy's coverage is excess.

The trial court had concluded that both policies provided primary coverage and that the two policies would be required to prorate. We agree with the trial court that the truckers' policy is primary, but conclude that the bobtail policy provides excess coverage in this case. We therefore reverse the declaratory judgment in part and remand with directions to enter judgment in accordance with this opinion.

As to the award of attorney's fees to the owner, the appellant concedes that the award is correct. The attorney's fee order in favor

of appellee Carbonell is therefore affirmed in its entirety.

Affirmed in part, reversed in part, and remanded for proceedings consistent herewith.

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JULY TERM, A.D. 1994

JULY 12, 1994

EMPIRE FIRE & MARINE INSURANCE CO.,	**	CASE NO.
Appellant(s),	**	93-02183
	**	93-01315
vs.		
	**	LOWER
LUIS CARBONELL, et al.,		TRIBUNAL NO.
	**	91-25810
Appellee(s).		

Upon consideration, appellee The Insurance Company of Pennsylvania's motion for rehearing is hereby denied. Nesbitt, Cope and Gersten, JJ., concur. The Insurance Company of Pennsylvania's motion for rehearing en banc is hereby denied.

A True Copy

ATTEST:

LOUIS J. SPALLONE

Clerk District Court of
Appeal, Third District

BY: /s/ Mary C. Blanks
Chief Deputy Clerk

cc: Rhea P. Grossman James I. Knudson
Joseph S. Kashi George V. Lanza
William G. Liston
/NB

IN THE DISTRICT COURT OF APPEAL
STATE OF FLORIDA
THIRD DISTRICT

CASE NOS. 93-1315
and 93-2183
(CONSOLIDATED)

Florida Bar No. 332542

EMPIRE FIRE & MARINE INSURANCE COMPANY,

Appellant,

vs.

LUIS CARBONELL, EAST COAST INTERMODEL SYSTEMS, INC., a/k/a E.C.I.S., INC., THE INSURANCE COMPANY OF PENNSYLVANIA and ROBERT L. LeCOUNT,

Appellees.

MOTION FOR REHEARING AND REHEARING EN BANC

Motion for Rehearing

Appellee, The Insurance Company of Pennsylvania, pursuant to Florida Rule of Appellate Procedure 9.330, moves this court for rehearing in the above-styled cause and as grounds therefor the Appellee submits the

following:

In this case, this court held that a lessor and lessee could not, by private agreement, allocate the risk of loss between themselves.

The decision is based upon an interpretation of 49 C.F.R. 1057(12)(c), which requires the lessee to assume all responsibility for operation of the equipment during the term of the lease. Thus, this court found that in spite of a lease clause shifting responsibility between the parties to the lessor, that the lessee was primarily liable for an accident which occurred while the lessor was bobtailing.

In reaching its opinion, this court either overlooked or misinterpreted **Transamerica Freight Lines, Inc. v. Brada Miller Freight Systems, Inc.**, 423 U.S. 28, 96 S.Ct. 229, 46 L.Ed.2d 169 (1975). In **Brada Miller**, the Court held that an indemnification

clause in a lease between a lessor and a lessee shifting ultimate responsibility for risk, solely between those parties, was not contrary to then 49 C.F.R. 1057.3(a) which placed responsibility for "control and responsibility for the operation of the equipment" upon the lessee.

The United States Supreme Court found that an indemnification agreement violated the Interstate Commerce Commission regulations only if the lessor was in control of the services provided as well as the physical operation of the vehicle. The Court found no conflict between the regulation and the indemnification clause because the indemnification clause did not infringe upon the requirements of the regulations that ultimate responsibility to shippers and third parties remain in the lessee.

Here, it is submitted that the lease clause regarding bobtail insurance as well as

shifting maintenance responsibility, between the parties but not as to liability third parties, fully complies with the regulations, and that here, between ECIS and Carbonell, that agreement should be enforced. That this is not in violation of the ICC regulations is fully supported by 49 C.F.R. section 1057.12(j) specifically provides that lessors and lessees may allocate the responsibility for bobtail insurance.

The fact that the ultimate responsibility for maintenance is required by the regulations to be in the lessee does not mean that, between the parties, the allocation of that responsibility could not be given to the lessor, any more that the parties in **Brada Miller** could not shift responsibility for all negligence through an indemnification agreement.

Motion for Rehearing En Banc

Appellee, The Insurance Company of

Pennsylvania, moves this court, pursuant to Florida Rule of Appellate Procedure 9.331, for a rehearing en banc in this cause, as and grounds therefor states:

For the reasons expressed in ISOP's motion for rehearing, *supra*, and because this court's opinion in this case disagrees with the four United States Courts of Appeal [1/] that have addressed the issue, on a matter of federal law, it is submitted that the panel decision is of exceptional importance.

I express a belief, based on a reasoned

[1/] **Empire Fire & Marine Ins Co. v, Guaranty National Ins. Co.**, 868 F.2d 357 (10th Cir. 1989); **Carolina Casualty Ins. Co. v. Underwriters Ins. Co.**, 569 F.2d 304 (5th Cir. 1978); **Empire Indem. Ins. Co. v. Carolina Casualty Ins. Co.**, 838 F.2d 1428, 1433 (5th Cir. 1988); **Canal Ins. Co. v. First Gen. Ins. Co.**, 889 F.2d 604 (5th Cir. 1989); **Carolina Casualty Ins. Co. v. Ins. Co. of North America**, 595 F.2d 128 (3rd Cir. 1979); **Travelers Ins. Co. v. Transport Ins. Co.**, 787 F.2d 1133 (7th Cir. 1986); **Occidental Fire & Casualty Co. of North Carolina v. International Ins. Co.**, 804 F.2d 983 (7th Cir. 1986).

and studied professional judgment, that the panel decision is of exceptional importance.

William G. Liston

Respectfully submitted,

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By: /s/ William G. Liston
William G. Liston

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 8th day of June, 1994, to: Rhea P. Grossman, Esquire, Rhea P. Grossman, P.A., 2710 Douglas Road, Miami, Florida 33133-2728, attorney for Appellant; James I. Knudson, Esquire, 1824 S. Fiske Boulevard, Rockledge, Florida 32955,

attorney for LeCount; Joseph S. Kashi, Esquire, Sperry, Shawpiro & Kashi, P.A., 633 South Andrews Avenue, #101, Fort Lauderdale, Florida 33301, attorney for Carbonell; and George V. Lanza, Esquire, 3300 Ponce de Leon Boulevard, Coral Gables, Florida 33134, attorney for Empire Fire & Marine Ins. Co.

_____
William G. Liston

RULE 9.330 REHEARING; CLARIFICATION; CERTIFICATION

(a) Time for Filing; Contents, Reply. A motion for rehearing, clarification, or certification may be filed within 15 days of an order or within such other time set by the court. A motion for rehearing or clarification shall state with particularity the points of law or fact that the court has overlooked or misapprehended. The motion shall not re-argue the merits of the court's order. A reply may be served within 10 days of service of the motion.

(b) Limitation. A party shall not file more than 1 motion for rehearing or for clarification of decision and 1 motion for certification with respect to a particular decision.

Supreme Court, U.S.
FILED
NOV 23 1994
OFFICE OF THE CLERK

NO. 94-655

in the Supreme Court of the United States

October Term, 1994

THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, and EAST COAST INTERMODAL SYSTEMS, INC., a/k/a E.C.I.S., INC.,

Petitioners,

vs.

EMPIRE FIRE & MARINE INSURANCE COMPANY, and LUIS CARBONELL,

Respondents.

On Petition for a Writ of Certiorari to the Florida District Court of Appeal, Third District

REPLY TO BRIEF IN OPPOSITION

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Local 174, Teamsters et al of Amer. v. Lucas Flour Co., 369 U.S. 95, 98 (1962)	2

a. Certiorari Jurisdiction Lies in this Court.

In its Brief in Opposition, Respondent erroneously alleges that this Court lacks jurisdiction because the issues presented in the Petition for Writ of Certiorari were purportedly not decided by the Florida Court of Last Resort. Respondent erroneously claims that Petitioners cannot invoke this Court's certiorari jurisdiction because Petitioners did not request that the Florida Third District Court of Appeal certify to the Florida Supreme Court the issue raised in this Petition. Respondent is wrong for two reasons.

First, Petitioners have properly invoked U.S. Supreme Court jurisdiction on the ground that conflict exists among the state and federal courts on an issue of interpretation of ICC regulations which was decided by the Florida Third District Court of Appeal, the state court of last resort. The issue to be resolved by this Honorable Court is thus one over which solely this Court has jurisdiction. There is no provision in the Florida law for any type of Florida Supreme Court jurisdiction over such inter-jurisdictional conflict.

Second, assuming *arguendo* that the issue of interstate conflict regarding the statutory intent underlying ICC regulations could properly be certified to and decided by the Florida Supreme Court, under Florida law, a party does not have a right to certification of an issue to the Florida Supreme Court. A party may request that the District Court of Appeal certify an issue; however, the Appellate Court is not required to do so. No right of review lies from a failure or refusal of a District Court of Appeal to certify any decision rendered by it. Thus, a party's request for certification has no legal effect in determining whether the United States Supreme Court has jurisdiction over any Florida District Court of Appeal decision which is not

appealable as a matter of right pursuant to the Florida Constitution and the Florida Rules of Civil Procedure. *Nash v. Florida Industrial Comm'n*, 389 U.S. 235, 237, n.1 (1967); *Lipsius v. Bristol-Myers Co.*, 209 So.2d 680, 681 (Fla. 1972), *citing Whitaker v. Jacksonville Expressway Authority*, 131 So.2d 22 (Fla. 1st DCA 1961). *See Local 174, Teamsters et al of Amer. v. Lucas Flour Co.*, 369 U.S. 95, 98 (1962) (failure to petition for rehearing *en banc* before state supreme court did not restrict United States Supreme Court's jurisdiction).

Based on the foregoing, it is respectfully submitted that certiorari jurisdiction lies in this Honorable Court.

Respectfully submitted,

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